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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NO. 416.

GROVER GLEN GOE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	4
Statement	4
Specifications of Errors to be Urged	10
Reasons for Granting the Writ	11
Conclusion	21
Appendix	22

CITATIONS

Calafato, Joseph., 124 F. (2d) 187 (C.C.A. 3rd)	19
Cohen v. Commissioner, 176 F. (2d) 394 (C.C.A. 10th)	14
Gleckman v. United States, 80 F. (2d) 394 (C.C.A. 8th)	15
Hague Estate v. Commissioner, 132 F. (2d) 775 (C.C.A. 2d)	16
Halle v. Commissioner, 175 F. (2d) 500 (C.A. 2d)	17
Helvering v. Kehoe, 309 U.S. 277 (1940)	20
Hoefle v. Commissioner, 114 F. (2d) 713 (C.C.A. 6th)	17
Howell Turpentine Company v. Commisioner, 162 F. (2d) 319 (C.A. 5th)	20
Kerbaugh, Henry S., 29 B.T.A., 1014, aff'd. 74 F. (2d) 749 (C.C.A. 1st)	12, 14
Lamb, Executor, v. Smith, Collector, 183 F. (2d) 938 (C.A. 3d)	20
Maddas v. Commissioner, 114 F. (2d) 548 (C.C.A. 3d)	14

PAGE

Mauch v. Commissioner, 113 F. (2d) 555 (C.C.A. 3d) 16

Oliver v. United States, 54 F. (2d) 48 (C.C.A. 7th) .. 18

Reis, C.E. 1 T.C. 9, 12, (1942), aff'd. 142 F. (2d) 900 (C.C.A. 6th) 14

APPENDIX

STATUTES

Revenue Act of 1936 (Taxable Year 1937)

Section 22 22

Section 42 (a) 22

Section 293 (b) 22

Revenue Act of 1938 (Taxable Year 1938)

Section 22 (a) 23

Section 42 (a) 23

Section 293 (b) 23

Internal Revenue Code (U.S.C. 1946 ed.)

Section 22 (a) 23

Section 42 (a) 23

Section 293 (b) (Taxable years 1939 through 1945—Same as Revenue Act of 1936) 23

Section 275 23

Section 276 23

Section 293 (b) 23

Section 1112 24

Regulations 94 (Revenue Act of 1936)

Regulations 101 (Revenue Act of 1938)

Regulations 111 (Internal Revenue Code)

Art. 42-1 24

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COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment entered in this case on July 30, 1952, by the United States Court of Appeals for the Third Circuit at No. 10,588, affirming the decision of the Tax Court of the United States entered June 26, 1951.

OPINION BELOW.

The Memorandum Findings of Fact and Opinion of the Tax Court (R. 4a-31a) are not officially reported. The Opinion of the Court of Appeals (R. 149-154) has not been reported as yet.

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for the inference drawn by the Tax Court "that the money banked by the taxpayer represented unreported income?"

STATUTES AND REGULATIONS INVOLVED.

The pertinent portions of the Statutes and Regulations involved are set out in the Appendix, *infra*, pp. 22.

STATEMENT.

In his Notice of Deficiency the Commissioner (a) added to the net income shown on taxpayer's income tax returns for each of the years 1937 through 1945 certain amounts which he determined as "Other Income"; (b) reduced the amount of the personal exemption claimed by taxpayer for each of the years 1937 to 1942, inclusive (not involved in this Petition); (c) determined deficiencies in taxes for the years 1937 through 1945 due to such additions of "Other Income" and reductions in personal exemption; and (d) added to such deficiencies penalties of 50% under Section 293(b) of the Internal Revenue Code.

In the Notice of Deficiency no reason was given for the additions to income of the items designated as "Other Income" other than as to each year the Commissioner stated the same to be "Other Income * * * not reported in the income tax return filed"; nor was any reason given for the addition to the deficiencies of the 50% penalties.

In his Petition to the Tax Court, petitioner alleged, *inter alia*, that no part of said amounts designated in the "Notice of Deficiency" as "Other Income" represented

gross income for any of said years and that no part of said deficiencies was due to fraud with intent to evade tax. In his Answer the Commissioner alleged the several amounts added to income represented "unreported income * * * derived from undisclosed sources", the failure "to report" such amount "of the net income derived by him (taxpayer) for the taxable year * * * was due to fraud with intent to evade and defeat tax." Petitioner's Reply denied all the material averments of the Answer.

The items of "Other Income" and the issue of fraud in connection therewith involved sixty-five (65) deposits of currency by petitioner in his checking account at the Union Trust Company, Pittsburgh, during the years 1937 through 1945, the deposits in these years aggregating, respectively, $8,490.00, $10,950.00, $5,790.00, $10,490.00, $11,600.00, $6,050.00, $3,650.00, $8,600.00 and $14,510.00. (R. 6a).

The Tax Court found, *inter alia,* that petitioner was an employee of the National Tube Company, Pittsburgh, continuously from 1913 to 1945, inclusive, until 1921, as a buyer of supplies at annual salaries, payable semi-monthly, ranging from $1,430.00 to $4,332.00, and thereafter, until 1925, Chief Clerk at yearly salaries ranging from $4,332.00 to $7,200.00, and since 1925, as Purchasing Agent at annual salaries ranging from $8,600.00 to $13,200.00, payable monthly; that the total salaries paid to him to 1937 were $155,463.00, in addition to which petitioner received bonuses totaling $7,733.00, or a total of $163,196.00; that the total gross salaries paid to petitioner from 1937 through 1945 were $108,333.00, with a net after deductions including $6,398.00 for income taxes and $1,500.00 for Government Bonds, of $98,027.08.

Petitioner testified that he estimated that *out of the cash retained* out of his pay checks he saved the following: 1913, approximately 80% thereof or approximately $320.00; 1914, $35.00 per month; 1915, $35.00 per month; 1916, nothing; 1917, $30.00 per month; 1918, $65.00 per month; 1919, $75.00 per month; 1920, $100.00 per month; 1921, $140.00 to $150.00 per month; 1922, $150.00 per month; 1923, $100.00 per month; 1924, $30.00 per month; 1925, $100.00 per month; 1926, $2,000.00; 1927, $2,000.00; 1928, $3,000.00; 1929, $5,000.00; 1930, $6,000.00; (the record does not show what part, if any, of the $6,028.10 of *cash* retentions out of 1931 salary was saved); 1932, $300.00 per month; 1933, $4,000.00; 1934, $3,000.00; 1935, $3,000.00; 1936, $2,400.00; 1937 to 1940, inclusive, $3,600.00 per year; 1941, $2,400.00; 1942, $2,400.00; 1943, $1,800.00; 1944, $1,500.00; 1945, $1,200.00, these estimated savings *out of cash retained from salary checks* totaling approximately $68,000.00; further, that petitioner estimated that up to 1912 he had saved $800.00, and that during the life of his mother she gave him $2,000.00 *in cash*. (R. 92a-107a)

Thus, the record herein shows that from August 15, 1913, to November, 1932, petitioner *retained in cash* out of his pay checks approximately $45,965.40, during the period December 1, 1932, to December 31, 1936, $15,737.38 and during the period 1937 through 1945, $25,401.77, a total of approximately $87,000.00; and withdrew *in cash* from his Bank of Pittsburgh and Union Trust Company accounts $2,895.00 and $12,667.50, received *cash* from his mother of $2,000.00 and by 1912 had saved $800.00 *of cash*, a total in excess of $105,000.00 of *cash*, as to no part of which other than possibly the $12,667.50 of cash withdrawn from the Union Trust Com-

pany account is there any question whatever in this case as to these amounts, *in excess of $90,000.00,* having been included in petitioner's income throughout the years.

Petitioner had only one employer in his business career, namely, National Tube Company, starting to work for that company when he was 16 years old. During the taxable years involved he was Purchasing Agent for it. (R. 77a). Since his honesty was being questioned through the deficiencies in taxes and fraud penalties determined by the Respondent, Petitioner produced eight (8) witnesses with whom he had come into contact in business transactions over a period of years and who testified as to his integrity, honesty, and general reputation for truthfulness in his dealings with them. (R. 63a-76a).

There is no evidence proving and no finding of fact by the Tax Court that the currency deposits added to Petitioner's income in the several years involved represented "income *derived*" by Petitioner in each of such years, nor is there any evidence that petitioner had any income-producing activities in any of the years involved other than as an employee of National Tube Company and several stock transactions. (R. 4a-141a).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the Commissioner did not have the burden of proving fraud and that the burden was upon petitioner to disprove fraud.

2. In holding that petitioner had any burden of proof as to the deficiencies involving the years 1937 through 1942, in which years the statute of limitations on assessments had expired, until the Commissioner proved that the amounts added to petitioner's income as "Other Income" through those years represented "income derived" by petitioner in such years, which he had to prove before he could be in a position to prove by clear and convincing evidence that the failure to include such "Other Income" in the income reported was fraudulent.

3. In holding that proof of bank deposits standing alone establishes the receipt of income in the year in which such deposits are made.

4. In holding that there was "reasonable basis" for the inference drawn by the Tax Court and substantial evidence to sustain its conclusion "that the money banked by the taxpayer represented unreported income" where there was no evidence proving or from which it could rationally and fairly be concluded and no finding of fact by the Tax Court that the "money banked" was derived by the taxpayer in the years for which added to his income by the Commissioner.

5. In affirming the Tax Court.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals disregards the plain provisions of the Revenue Acts of 1936 and 1938 and the Internal Revenue Code as to what constitutes "gross income" and that all items of gross income shall be included in gross income for the "taxable year" in which received by the taxpayer. (Sections 22 and 42 of said Acts and Code and Art. 42-1 of Reg. 94, 101 and 111). It disregards the plain provisions of Section 1112 of the Internal Revenue Code (derived from Section 907(a), of the Internal Revenue Act of 1924, as amended by Section 601 of the Internal Revenue Act of 1928). This Section places upon the Commissioner the burden of proof to establish the presence of "fraud with intent to evade tax", which alone justifies the imposition of the fraud penalty. The decision disregards that this is an affirmative burden of proof which must be met by clear and convincing evidence. The decision is in conflict with decisions of other Courts of Appeal on the same matters and has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the Tax Court of the United States as to call for an exercise of this Court's power of supervision.

The decision of the Court of Appeals is without precedent and will if not reversed place the Commissioner of Internal Revenue in a position where he may disregard specific provisions of the Internal Revenue Acts and Code as to what constitutes gross income, when amounts shall be included therein, when taxes may be assessed against taxpayers, disregarding fixed periods of limitation for assessments and throw upon taxpayers the burden of *disproving* fraud no matter how ill-founded his determi-

nation may be or what taxable year it may cover. A review of this case and a reversal of the decision of the Court of Appeals is necessary not only from the standpoint of firmly fixing guide posts for the administration of the Internal Revenue Acts and Code as affecting the questions here involved, but as well that justice may be done not only to this taxpayer but as well to possibly thousands of other taxpayers who may find themselves in the unfortunate position of this petitioner.

1 and 2. Under Section 22 of the Revenue Acts of 1936 and 1938 and the Internal Revenue Code, "gross income" includes only items of income "derived", and under Section 42 of said Acts and Code, as well as under the Commissioner's Regulations 94, 101 and 111, "The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, * * *." Under Section 48 of said Revenue Acts and Code, "taxable year" means "the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed * * *." On the returns as filed net income was computed on the basis of cash *receipts*.

The Commissioner had the burden of proving fraud by clear and convincing evidence that the amounts of currency added to taxpayer's net income as reported constituted "income derived" (Sec. 22a of the Rev. Acts and Code, *supra*) in each of those years. (*Henry S. Kerbaugh*, 29 B.T.A., 1014, aff'd. 74 F. (2d) 749, (C.C.A. 1st, 1935). To meet this burden he had to prove the receipt or derivation by taxpayer of the currency deposits in the years for which they were added to income. The Commissioner made neither direct nor indirect proof of the *receipt* by taxpayer in *any of said years* of *any* unreported

taxable income upon which he based his charge of fraud. Despite this failure on the part of the Commissioner to meet his burden on the issue of fraud, despite the fact that as to the Commissioner's determinations on the years 1937 through 1942 (because of the expiration of the statute of limitations on the assessment of deficiencies for those years) taxpayer had no burden to prove anything respecting the currency deposits added to his income in those years until the Commissioner proved the "receipt" by taxpayer in the years in question and the source of such currency deposits, despite the further fact that the Tax Court stated in its opinion that (R. 22a) "The Respondent was unable to ascertain the source of the money and the evidence before us does not reveal it," and despite the still further fact that the Tax Court did not make *any finding* as to the years in which taxpayer derived or received *any* of the currency represented by the deposits, the Court of Appeals gave no consideration whatever in its decision to what the Commissioner did or failed to do in meeting the burden of proof which he had under the law, but only gave consideration to what taxpayer attempted or failed to prove as to *the source* from which such currency deposits were derived *and when derived.* In affirming the Tax Court, which had sustained the Commissioner on the issue of fraud, "for lack of proof of error" (R. 22a), the Court of Appeals committed the same error of law as did the Tax Court as to the Commissioner's burden of proof of fraud and thus holds that the burden was *upon the taxpayer to prove the source or sources from which the currency deposits were derived* and *that they were not derived in the years for which added to taxpayer's income* by the Commissioner. The Court of Appeals gave no consideration to the fact that as a matter of law the Commissioner had

to prove that the currency deposits were income "derived" in the years for which he had added them to taxpayer's income and to prove by clear and convincing evidence that the failure to so include them was due to fraud with intent to evade tax, before it could properly be held that he had sustained his burden of proof of fraud on all years involved and had thus met the burden of proof on the statute of limitations issue on the deficiencies in taxes determined by him for the years 1937 through 1942, and thus plainly erred.

That the Court of Appeals error as to the Commissioner's burden of proof in connection with the issues of fraud and the statute of limitations was *part of the basis* for its *erroneous* conclusion that the finding and assessment of a deficiency was reasonable and must be sustained is clearly shown by the Court's reasoning (R. 153) that, "* * * once it was *concluded* [even though erroneously] that the bank deposits represented *current* income there was no basis for viewing the failure to report that additional income as anything but willful, or the erroneous explanation offered by taxpayer as anything but deliberately false." And this despite the fact that there was *not one word of evidence in the record to prove or from which it could rationally and fairly be concluded* that the currency deposits represented "income derived" by the taxpayer in the taxable years to which they were *allocated* by respondent!

It is submitted that the decision of Court of Appeals on the issues of fraud and the statute of limitations is in direct conflict with *Henry S. Kerbaugh, supra,; Cohen v. Com.*, 176 F.(2d) 394 (C.C.A. 10th); *Maddas v. Com.*, 114 F. (2d) 548 (C.C.A. 3rd); C. A. Reis, 1 T.C. 9, (1942), aff'd 142 F. (2d) 900 (C.C.A. 6th).

3. The Commissioner's case on currency deposits was based upon *the evidence of the deposits* and nothing else, unsupported by any income-producing "source" from which the amounts involved were obtained or any "time" as to when they were "derived" by petitioner. Not only are they not identified by any income-producing activity of the taxpayer in the years involved but the record does not show any possible source of income-producing activity from which they could have been derived by the taxpayer in those years other than possibly in part from salary from National Tube Company in those years.

None of the cases relied upon by the Court of Appeals are authority for its holding that proof of bank deposits standing alone establishes the receipt of income. In all of the cited cases the amounts of income charged to the several taxpayers by those decisions were clearly shown to have been "derived" or "received" by the taxpayers in the years as to which the amounts were added to income, and in all the cases the amounts were identified with some transactions or income-producing activities of the taxpayers. *In all of the cases cited* in this respect by the Court of Appeals *the conclusions drawn were rational and fair inferences based upon receipts and income-producing sources or activities.* Here, there is no evidence of either and the Tax Court's and Court of Appeals' conclusions are speculative and arbitrary.

The decision of the Court of Appeals is plainly in conflict with *Gleckman v. United States,* 80 F. (2d) 394 (C.C.A. 8th), where the Court said:

> "* * * We think that there was in this case *substantial circumstantial evidence* that Mr. Gleckman *did have a business outside of that described*

in his return and that *at least some of his deposits* were *derived* from it.

"The *bank deposits and* large *items of receipts* by Mr. Gleckman *do not,* therefore, stand entirely *alone* as the *sole proof* of the existence of a tax due from him, *but they are identified with business carried on by him and so,* are *sufficiently shown to be of a taxable nature.*" (Emphasis supplied).

In *Hague Estate v. Com.*, 132 F. (2d) 775 (C.C.A. 2d), where there was no burden of fraud upon the Commissioner nor any question as to the statute of limitations and accordingly the determination of the Commissioner was *prima facie* correct, to the extent of the *amounts received* by Hague during the years 1936, 1937 and 1938 and not shown therein or conceded by the Commissioner to have been other than income, the Commissioner's determination was sustained, the Court of Appeals stating that, "Under the circumstances shown" the determinations of the Commissioner were based upon "inferences properly drawn from *the facts proved by the evidence.*" Here, there is *no* evidence that *any* of the amounts of currency deposits added to taxpayer's income in the several years were *received* by him in such years and no evidence of any income-producing source from which they could have been derived other than possibly in part from salary from National Tube Company, and accordingly *no evidence* upon which it could rationally and fairly be concluded that the deposits were *income derived* in such years.

In *Mauch v. Com.*, 113 F. (2d) 555 (C.C.A. 3d), the petitioner was a lawyer actively engaged in his practice and the record showed that substantially all of the amounts involved were *attorney's fees received* by him

in the two years involved, as well as amounts *received* in those years *from unnamed clients* (whom the taxpayer refused to name) and which amounts were deposited in his bank account, commingled with other funds belonging to him and used for his own use and enjoyment. There the Tax Court concluded and the Court of Appeals for the Third Circuit affirmed, that *the evidence clearly established* that the taxpayer *received* in the years involved the *amounts in question.*

In *Halle v. Com.,* 175 F. (2d) 500 (C.A. 2d), the taxpayer was a successful lawyer. The years involved were 1929 through 1938. The Commissioner had the burden of proving fraud in all years. In its Opinion the Tax Court stated (7 T.C. 245):

> "* * * The Commissioner *has shown clearly* that the petitioner *received and retained,* used for his own benefit, or gave to his wife *large amounts in each year,* he *received* those amounts *from others,* and he received them *as a result of his efforts in the transaction of business carried on by him for gain or profit.* Such items were income * * *." (Emphasis supplied)

In the *Halle* case, the *net increase* in the petitioner's wealth *for each year* was the amount which the Commissioner *added to the taxpayer's income for each year.* In each year the *findings of fact* of Tax Court stated *the additional gross income from taxpayer's business each year* which was *not reported* on his tax returns. In each of the years the Commissioner added to the income as reported an amount described as *"gross income from business understated."*

In *Hoefle v. Com.,* 114 F. (2d) 713 (C.C.A. 6th) the Tax Court sustained the Commssioner (and the Circuit

Court affirmed) in holding that certain unidentified deposits constituted income. Assessments of penalties were approved. There, in the year involved, taxpayer sold 48,500 shares of stock in 124 transactions, using four accounts, each under a code number, with three brokerage houses. The stocks cost taxpayer over $4,045,000 and brought him over $4,216,000. After deductions, a net profit in excess of $151,000 remained. The taxpayer did not file his return until a year and seven months after it was due. In its Opinion, the Court of Appeals stated:

> "* * * Although his brokers had complete records which showed a net profit on his tradings alone in excess of $150,000, petitioner returned a gross income of only $92,886.61."

In *Oliver v. United States,* 54 F. (2d) 48 (C.C.A. 7th), the taxpayer was a political leader for many years. He testified that he handled a great deal of money for other persons during a political campaign, in addition to money which he handled in playing the races, etc. There were many transactions shown in evidence in which he handled large sums of money. His bank account showed that money in excess of $450,000 passed through his accounts during the three years in question. He kept no books, *not even check stubs,* from which an intelligent examination might be had to determine the source of the money constituting the deposits. He attempted orally to explain various transactions but, the Court of Appeals stated, "a careful examination of the testimony convinces us that a great deal of this amount *was money received* by appellant as his own and was *from sources other than from his salary.*" In a single instance a check in excess of $18,000 was traced directly to the taxpayer's bank account. As

to this the Appellate Court said, "The Court was *amply justified in finding this sum was paid to him as a bribe.*"

In *Joseph Calafato,* 124 F. (2d) 187 (C.C.A. 3d), affirming 42 B.T.A. 881, the taxpayers failed to file returns for many years, kept no books of account or records, one of them had corn sugar and black molasses transactions, had the reputation of being in the bootlegging business, and professed to know nothing whatever about any of the bank deposits or bank accounts examined by the Commissioner. There the Board of Tax Appeals in its Opinion stated:

> "The evidence *clearly indicates* that these petitioners *received* substantial amounts of income *during each of the taxable years* and it is undisputed that they filed but one return, namely, for the year 1933. *In this return* they *substantially understated* the amount of their income. Respondent has proved to our satisfaction that a part of the deficiency for each of the taxable years was due to fraud with intent to evade tax, and we so hold."

The Court of Appeals affirmed.

From the foregoing it is apparent that *the basis for the conclusion* of the Court of Appeals in the instant case (lacking a showing by the Commissioner of proof of fraud, by his failure of proof of source and derivation of the currency deposits in the years here involved and his failure to meet the burden of proof on the statute of limitations issue for 1937 through 1942) is in direct conflict *with the bases for the conclusions of the Courts of Appeal in the above-cited cases,* and thus plainly grounds for the granting of a Writ of Certiorari herein.

4. The Tax Court is authorized to determine the facts as the record presents them and to draw reasonable inferences from the facts so determined. It is without authority to make findings contrary to those which are disclosed by the record, and it cannot draw inferences the contrary of those which the record compels. *Lamb, Executor, v. Smith, Collector,* 183 F. (2d) 938 (C.A. 3d); *Howell Turpentine Co. v. Com.,* 162 F. (2d) 319 (C.A. 5th). Upon review when there is substantial evidence to support the conclusion of the Tax Court it must be accepted, and when there is no substantial evidence so to do, the challenged judgment must be reversed. *Helvering v. Kehoe,* 309 U.S. 277 (1940). Here there is *no evidence* in the record proving or from which it can rationally and fairly be inferred that the currency deposits involved constituted "income derived" in the taxable years to which they were allocated by the Commissioner and thus the Court of Appeals committed an error of law in concluding otherwise, in sustaining the Tax Court on the deficiencies in tax and in concluding there was ample evidence that the taxpayer acted fraudulently to avoid taxes.

5. Finally, in the Court of Appeals' failing to recognize that the burden of proof of fraud was upon the Commissioner and in placing upon taxpayer *the burden of disproving fraud,* which decision constitutes a serious and unwarranted disregard of the plain provisions of the Internal Revenue Acts and the Internal Revenue Code and an invasion of the legislative functions of the Congress, and in the Court of Appeals' holding that proof of bank deposits *standing alone* establishes the receipt of income in the year in which such deposits are made, in conflict with the decisions of other Courts of Appeal

on the matter, the decision constitutes a grave interference with an orderly and lawful administration of the Internal Revenue Acts and the Internal Revenue Code and should not be sanctioned by this Court.

Conclusion.

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October, 1952.

APPENDIX.

Statutes and Regulations Involved.

Revenue Act of 1936 (Taxable year 1937)

"Sec. 22. *Gross Income.*

"(a) General definition. — 'Gross income' includes gains, profits, and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * * *

"Sec. 42. *Period in Which Items of Gross Income Included.*

(a) General Rule.—The amount of all items of gross income shall be included in gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

* * * * * * *

"Sec. 293 *Additions to the Tax in Case of Deficiency.*

* * * * * * *

"(b) Fraud.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in

addition to such deficiency) shall be so assessed, collected, and paid, * * *.'

Revenue Act of 1938 (Taxable year 1938)

Sec. 22(a), Sec. 42(a) and Sec. 293(b).

(Same as in Revenue Act of 1936, above.)

Internal Revenue Code—(U.S.C. 1946 ed.)

Sec. 22(a), Sec. 42(a) and Sec. 293(b). (Taxable years 1939 through 1945).

(Same as Revenue Act of 1936, above.)

"Sec. 275 *Period of Limitation upon Assessment and Collection.*

(All taxable years involved.)

"Except as provided in Section 276—

"(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * * * *

"Section 276. *Same Exceptions.*

"(a) False Return or No Return—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Sec. 293(b) (Same as in Revenue Act of 1936, above.)

"Section 1112. *Burden of Proof in Fraud cases.*

"In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner."

Regulations 94. (Revenue Act of 1936) (Same as in Regulations 101 (Revenue Act of 1938) and 111 (Internal Revenue Code)

"Art. 42-1. *When Included in Gross Income.* Except as otherwise provided in section 42 in the case of the death of a taxpayer, gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer * * *."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Calafato v. *Commissioner*, 42 B. T. A. 881, affirmed *per curiam*, 124 F. 2d 187	12
Comstock v. *Group of Investors*, 335 U. S. 211	8
Elmhurst Cemetery Co. v. *Commissioner*, 300 U. S. 37	8
Hague Estate v. *Commissioner*, 132 F. 2d 775, certiorari denied, 318 U. S. 787	12
Halle v. *Commissioner*, 175 F. 2d 500, certiorari denied, 338 U. S. 949	12
Helvering v. *Kehoe*, 309 U. S. 277	8
Hoefle v. *Commissioner*, 114 F. 2d 713	12
Mauch v. *Commissioner*, 113 F. 2d 555	12
Oliver v. *United States*, 54 F. 2d 48, certiorari denied, 285 U. S. 543	12
Statutes:	
Internal Revenue Code:	
Sec. 22 (26 U. S. C. (1946 ed.) 22)	14
Sec. 42 (26 U. S. C. (1946 ed.) 42)	14
Sec. 275 (26 U. S. C. (1946 ed.) 275)	15
Sec. 276 (26 U. S. C. (1946 ed.) 276)	15
Sec. 293 (26 U. S. C. (1946 ed.) 293)	9, 15
Sec. 1112 (26 U. S. C. (1946 ed.) 1112)	15
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 22	16
Sec. 42	16
Sec. 275	16
Sec. 276	16
Sec. 293	16
Revenue Act of 1938, c. 289, 52 Stat. 447:	
Sec. 22	16
Sec. 42	16
Sec. 275	16
Sec. 276	16
Sec. 293	16

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 416

GROVER GLENN GOE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 4a–31a) are not officially reported. The opinion of the Court of Appeals (R. 149–154) is reported at 198 F. 2d 851.

JURISDICTION

The judgment of the Court of Appeals was entered July 30, 1952. (R. 154.) The taxpayer's petition for rehearing, filed on August 26, 1952, was denied on September 10, 1952. (R. 189.) The petition for a writ of certiorari was filed on October 25, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the court below correctly affirmed the Tax Court's findings and decision upholding the deficiencies in income taxes and the imposition of the fifty percent fraud penalties thereon under Section 293 (b) of the Internal Revenue Code, as asserted against the taxpayer by the Commissioner for each of the taxable years 1937 to 1945, inclusive.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra*, pp. 14–16.

STATEMENT

The facts, as found by the Tax Court (R. 5a–17a), and concurred in by the Court of Appeals (R. 151), may be summarized, as follows:

During the years 1913 to 1945, inclusive, petitioner, the taxpayer, was a salaried employee of the National Tube Company, Pittsburgh, Pa. The total salary, including bonuses, received by him from 1913 to 1936, inclusive, was $163,196.[1] (R. 5a.)

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[1] Petitioner received a gift of $2,000 from his mother at an undisclosed time prior to her death in 1932 or 1934 (R. 13a).

From 1912 until November 1, 1932, petitioner maintained a checking account with the South Side Trust Co., Pittsburgh, Pa. From August 15, 1913 to November 1, 1932, he received salary checks amounting to $114,531.54 of which he deposited $68,566.14 in this account. In 1924 and 1926 petitioner deposited in the account $2,738.34 and $4,750, respectively, which amounts were the proceeds of sales of prop-

The tax years involved are 1937 to 1945, inclusive. During those years petitioner's total salary amounted to $108,333. He paid income taxes amounting to $6,398 and purchased Government bonds to the extent of $1,500 during the tax years, leaving a net of $98,027.08. (R. 5a.) During the tax years petitioner deposited in a checking account in the Farmers Deposit National Bank of Pittsburgh the sum of $72,625.31 which was derived from his salary checks. He retained the sum of $25,401.77 out of those checks. (R. 10a–11a.) From 1933 to 1945, inclusive, petitioner withdrew a total of $102,343.41 from the account in the Farmers Deposit National Bank for various expenses (R. 12a).[2]

Petitioner also, during the tax years involved, deposited in a checking account in the Union

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erty. Petitioner had no records of withdrawals from this account. (R. 5a.)

From February 14, 1929 until September 19, 1931, petitioner maintained a checking account in the Bank of Pittsburgh N. A. During 1929, 1930, and 1931, petitioner withdrew from this account a total of $50,175.09. Of these withdrawals, $2,895 was for cash, $3,851.77 to pay interest, $25,499.97 for investments, $15,900 to pay loans, $1,056.75 for club expenses, and $971.60 for miscellaneous charges. He maintained no record of what he did with the withdrawals. A $15,000 withdrawal was made in 1931 to pay the balance due on a bank loan made by petitioner in 1929 in the amount of $22,500 or $27,500. (R. 5a–6a.)

[2] Petitioner's salary from December 1, 1932 to the close of 1936 was $40,096.38 of which he deposited $24,357 in the Farmers Deposit National Bank, retaining the sum of $15,737.38 (R. 10a).

Trust Co., Pittsburgh, Pa., a total of $145,158.93. Of this amount, $58,343.24 was derived from sales of securities, proceeds of insurance, etc., *i. e.*, sources other than his salary. Of the deposits made in this account during 1937–1945, 65 were of currency amounting to $80,130, none of which was cash retained by petitioner out of salary checks received by him during the same years the respective deposits were made. (R. 6a.) From 1931 to 1945, inclusive, petitioner withdrew from this account a total of $155,505.57.[3] Of this total, $55,597.98 was for miscellaneous investments, $46,547.40 for oil ventures, $12,667.50 for cash, $11,009.06 for taxes, $1,073.62 for insurance, $3,679.20 for automobile expense, $994.32 for club expense, $1,005.42 for interest, $11,850.67 for payments on loans, $110.00 for contributions, and $10,970.40 for miscellaneous purposes. (R. 8a-9a.) Included in the miscellaneous purposes were checks for expenses at the Claridge Hotel in 1940–1941 and 1944 amounting to $2,092.45; also checks amounting to $300 for jewelry, $225 for furs, and $249 for feminine wearing apparel (R. 10a).[4]

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[3] From July 1932 to the close of 1936 petitioner had deposited in the account a total of $14,974.77 (R. 6a).

[4] Petitioner had a safe deposit box at the Union Trust Co. during the tax years. He was granted access to it four times in 1937, seven times in 1938, twice in 1939, once in 1941, three times in 1942, twice in 1943, and six times in 1945. Five dates of access to the safe deposit box coincide with the dates of the deposit of currency in his checking account in that bank. (R. 13a.)

In addition to his salary, petitioner reported other income amounting to $8,028.38 during the tax years, consisting of interest, dividends, and profits from oil syndicates (R. 13a).

Petitioner did not keep a set of books showing his income and expenses, or records of any amount saved out of cash retained from his salary checks. His only records of income and expense consisted of check books, cancelled checks, and bank deposit slips. (R. 13a.) In determining deficiencies in petitioner's income taxes for the years 1937–1945, the Commissioner included the 65 deposits of currency made in the Union Trust Co. account in petitioner's gross income for the respective years as "other income" (R. 14a).

In an interview in May 1946 with a special agent who was investigating petitioner's income tax returns for the years 1942–1945, petitioner was asked to produce checks and records to support his returns for those years. He produced the statements and checks pertaining to the Farmers Deposit National Bank account, but nothing pertaining to the Union Trust Company account. Upon being asked whether the Farmers Deposit National Bank was the only place where he did his banking, petitioner replied that it was. In June 1947, petitioner admitted to a special agent and a revenue agent that at the time of the interview in May 1946, he had not disclosed that he had a checking account with the Union

Trust Co. This was after petitioner had been informed by an official of the bank that the agents had learned that he had an account in that institution. (R. 14a.)

In 1932, petitioner and his wife agreed to live apart, and they did thereafter live apart throughout the tax years (R. 14a). Petitioner supported his wife and daughter in a separate establishment until 1944. After the daughter's marriage in 1944, he supported his wife at the same separate place. (R. 15a.)

For the years 1937 to 1940, inclusive, petitioner claimed exemptions as a married man living with his wife. In 1941, he claimed the maximum exemption without giving information as to his status for an exemption, and in 1942 he claimed the maximum exemption as head of a family. (R. 16a.) He claimed a credit of $400 in 1937 and $133.33 in 1938 for dependents, his daughter being listed as the dependent (R. 17a).

The deficiency notice in this case was mailed to petitioner on July 2, 1948. No agreement was entered into by petitioner with the Commissioner to extend the statutory period for assessing taxes for the years 1937 to 1942, inclusive. Petitioner executed consent agreements extending the time for assessing income taxes for 1943 and 1944 until June 30, 1949. (R. 17a.)

Petitioner alleged in his petition filed in the Tax Court that $10,800 of the deposits of cur-

rency made by him in the Union Trust Co. account during the tax years represented savings from the cash withdrawals he had made from 1937 to 1945, inclusive, from that account, and that between $15,000 and $20,000 represented cash he had retained from his salary checks, all of which had been kept in his safe deposit box (R. 30a). These allegations and his testimony before the Tax Court were in conflict, and neither the Tax Court (R. 29a–31a) nor the Court of Appeals (R. 151–153) was willing to credit his testimony.

The Tax Court found and held that the income tax returns filed by petitioner for the tax years involved were false or fraudulent with intent to evade tax, and that the deficiencies for each tax year were due to fraud with intent to evade tax (R. 17a). The Tax Court thereupon sustained the deficiencies in income taxes and fraud penalties assessed by the Commissioner (R. 32a), and the Court of Appeals affirmed (R. 149–154).

ARGUMENT

This case presents no question which warrants review by this Court. In substance, petitioner's contention (Pet. 11) is that there was insufficient evidence of unreported income to sustain the Commissioner's determination that petitioner's income tax returns for the tax years involved fraudulently understated his income. The ques-

232035—52——2

tion presented is, therefore, one of fact. *Helvering* v. *Kehoe,* 309 U. S. 277, 279; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40. Both courts below concurred in finding that petitioner's returns fraudulently understated his income with intent to evade tax, and that the deficiencies were due to fraud. A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of exceptional circumstances. *Comstock* v. *Group of Investors,* 335 U. S. 211, 214.

It is clear that there was sufficient evidence to support the determination of the Commissioner and the findings of the courts below that petitioner fraudulently understated his income for the years 1937–1945, inclusive. Petitioner deposited approximately $223,000 in his accounts with the Union Trust Co. and the Farmers Deposit National Bank during those years, of which only approximately $140,000 was identifiable (R. 151). The net total salary received by him during the years in question was $98,027.08 (R. 5a), and his other disclosed income amounted to $8,028.38 (R. 13a), or a total disclosed income from all sources of $106,055.46. He retained from his checking account only $25,401.77 of his salary (R. 11a). Yet he deposited unexplained currency amounting to $80,130 in the Union Trust Co. account during the tax years.

When the special agent who was investigating his income tax returns for 1942–1945 interviewed him and requested him to produce checks and records to support his returns for those years, he produced only those pertaining to the Farmers Deposit National Bank account and failed to produce anything pertaining to the Union Trust Co. account where the large currency deposits had been made. In answer to the question whether the Farmers Deposit National Bank was the only place where he did his banking, he replied that it was the only place. (R. 14a.) He disclosed the existence of the Union Trust Co. account only after he had been informed by an official of that bank that the agents had learned of the existence of the account. (R. 14a.) Petitioner deliberately claimed in his returns the maximum exemptions for four of the tax years on the representation in his returns that he was a married man living with his wife, although during all of the tax years he and his wife lived apart. He also claimed the maximum exemptions without explanation for one of the tax years, and as the head of a family for another year, when he was not so entitled.[5]

In his verified petition filed in the Tax Court, petitioner alleged that the unexplained currency deposits were derived from sales of securities and

[5] It will be observed that 26 U. S. C. 293 (b), *infra*, p. 15, expressly provides that if any part of a deficiency is due to fraud, the fraud penalty attaches to the entire deficiency.

from cash on hand and in his safe deposit box, no other receptacle being mentioned (R. 18a). At the hearing before that court, he testified vaguely that they had, for the most part, been kept in an office safe, to which he alone had access, since about 1914 (R. 20a, 29a). He also testified that his ability to save such large amounts was due to the fact that he at all times lived economically. His large withdrawals for general expenses (R. 8a–9a, 12a) and his expenditures at hotels and clubs, and for jewelry and other gifts (R. 10a), refuted his assertion that he practiced economy. In an endeavor to show his frugality, he testified that his expenses were less after his separation from his wife than before, although he maintained two establishments after the separation. (R. 21a.) Although he claimed that by 1929 he had put aside a cash reserve of more than $60,000, during that year he borrowed more than $20,000 from a bank. He later borrowed about $12,000. Interest was paid on these obligations for several years. He failed to explain why he had borrowed such large amounts and paid interest thereon while he had a large idle cash reserve. (R. 21a.) The Tax Court concluded that petitioner's contradictory testimony, considered with his demeanor on the witness stand, lacked probative value (R. 20a), and the Court of Appeals expressed the view that petitioner's recital as to the source of the currency deposits without com-

plete and plausible explanation, was not very persuasive (R. 152).

In the circumstances of this case, the Commissioner and the courts below could reasonably infer that the currency deposits were income to petitioner during the respective tax years, and that he acted fraudulently with intent to evade tax when he failed to report them as income in his returns for those years. And the burden was on petitioner in the Tax Court to rebut the presumption of correctness attaching to the Commissioner's determination. In this he failed, since his verified statements and his testimony were so conflicting and so contradictory as to lead both courts below to conclude that his sole testimony was unworthy of belief.

Petitioner's contention that it was error to sustain the Commissioner's determination of unreported income solely on the basis of unexplained bank deposits was aptly answered by the Court of Appeals, as follows (R. 150–151):

> He reasons, first and correctly, that proof of bank deposits standing alone does not establish the receipt of income. But he goes astray in his next proposition that in order to establish an inference of income the evidence must link the bank deposit with an identified income producing activity. Of course proof of such a relationship is one way of proving that the deposit represents income. *Gleckman* v. *United States,*

> 8 Cir. 1935, 80 F. 2d. 394. But many other circumstances may create the same inference. "Deposits in checking accounts are so often made up of income that where * * * that is the fair inference to be drawn from the facts it * * * [is] proper to give it effect". See *Hague Estate* v. *Commissioner,* 2 Cir. 1943, 132 F. 2d 775, 777. * * * The sum of the matter is that a reviewing court will disturb a determination that particular bank deposits represent and reflect current income only if in the circumstances of the case that conclusion seems speculative and arbitrary rather than rational and fair.

The issues in cases of this character being factual, each case, of course, turns upon its own particular facts. The courts, however, have uniformly held in analogous situations that determinations of deficiencies and impositions of fraud penalties were proper. See, *e. g., Halle* v. *Commissioner,* 175 F. 2d 500 (C. A. 2), certiorari denied, 338 U. S. 949; *Hague Estate* v. *Commissioner,* 132 F. 2d 775 (C. A. 2), certiorari denied, 318 U. S. 787; *Hoefle* v. *Commissioner,* 114 F. 2d 713 (C. A. 6); *Oliver* v. *United States,* 54 F. 2d 48 (C. A. 7), certiorari denied, 285 U. S. 543; *Mauch* v. *Commissioner,* 113 F. 2d 555 (C. A. 3); *Calafato* v. *Commissioner,* 42 B. T. A. 881, affirmed *per curiam,* 124 F. 2d 187 (C. A. 3).

CONCLUSION

The decision of the court below is correct, there are no conflicts of decision, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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NOVEMBER 1952.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.—"Gross income"* includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) [Amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 42.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(26 U. S. C. 1946 ed., Sec. 275.)

SEC. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(26 U. S. C. 1946 ed., Sec. 276.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U. S. C. 1946 ed., Sec. 293.)

SEC. 1112. BURDEN OF PROOF IN FRAUD CASES.

In any proceeding involving the issue whether the petitioner has been guilty of

fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.

(26 U. S. C. 1946 ed., Sec. 1112.)

Sections 22 (a), 42, 275 (a), 276 (a), and 293 (b) of the Revenue Acts of 1936, c. 690, 49 Stat. 1648, and 1938, c. 289, 52 Stat. 447, are substantially identical to the corresponding sections quoted above.

U. S. GOVERNMENT PRINTING OFFICE: 1952